MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ABOLITION OF REMEDY AGAINST THIRD PERSONS—A very nice problem arising under workmen's compensation laws is that involving the situation where a workman has been injured under such circumstances as to create a legal liability in some third person, not the employer, although the injury has occurred in the course of the employee's employment and upon the premises of the employer. Is the workman's right to sue such third person abolished, or is the workman forced to elect between the third person and the employer in his recovery of compensation, or has he a double remedy?

The Washington act [1] provides that each workman "who shall be injured whether upon the premises, or at the plant, or, he being in the course of his employment, away from the plant of his employer", shall receive compensation out of the accident fund, and that such payment "shall be in lieu of any and all rights of action whatsoever against any person whomsoever".[2]

This section of the act was first considered in *Peet* v. *Mills*,[3] in which a motorman was injured in a collision between two trains, due to the failure to use the block signal system with which the road was equipped, the operation of which had been forbidden by the president of the road. An action was brought against the president personally, based upon negligence. It was held that the action was improperly brought, and that compensation could be recovered from the company alone, because "the compensation provided by the act in case of injury to any workman in any hazardous occupation was intended to be exclusive of every other remedy, and all causes of action theretofore existing except as they are saved by the provisos of the act are done away with."

The next and last case involving this point is *Meese* v. *Northern Pacific Railway Company*.[4] An employee of a brewery was killed while loading kegs in a freight car by the negligence of an engineer of the railway company. Although the accident occurred upon the premises of the brewing company, the decedent's dependents brought an action at law against the railroad company. A demur-

[1] Wash. Sess. Laws, 1911, Chap. 74, Sec. 5, p. 345.

[2] Section 5 is qualified by the following proviso in section 3: "If the injury to a workman occurring away from the plant of his employer is due to the negligence or wrong of another not in the same employ, the injured workman, or if death results, his dependents, shall elect whether to take under this act or seek a remedy against such other, and if he take under this act the cause of action against such other shall be assigned to the state for the benefit of the accident fund; if the other choice is made the accident fund shall contribute only the deficiency, if any, between the amount of recovery against such third person actually collected and the compensation provided or estimated by this act for such case."

[3] 76 Wash. 437 (1913).

[4] 206 Fed. 222 (1913).

rer to the complaint was sustained, the opinion of the court being that the proviso in Section 3 [5] expressly preserving the right of action at law for the death of an employee resulting from an injury "occurring away from the plant of the employer", clearly showed an intention to except from that provision of the act, which abolished all private controversies and all rights of civil action, what, but for such provision, would have been abolished, and that, as the right of civil action was alone preserved when the injury occurs "away from the plant of the employer", then it was not preserved when it occurred at the plant of the employer.

The argument that the act took away a right of action existing at common law was answered in these words: "There is no right of action at common law to recover for death occasioned by the wrongful act of another. It is a right solely given by statute. A right such as this, which the legislature gives, it may, of course, take away".[6]

The Circuit Court of Appeals [7] reversed the District Court, holding that the act applied only as between employer and employee, and had no effect upon the relation of employee and third person.[8] The *Peet* v. *Mills* case [9] was distinguished on the ground that there the injury was caused by the negligence of the president of the railroad, that is, one who was in the same employ with the workman.

The Supreme Court of the United States, in a case recently decided,[10] has overruled the Court of Appeals' decision and sustained the District Court, holding that the decision of the Washington Supreme Court in *Peet* v. *Mills* [11] was binding upon it, being the construction of a state statute deliberately adopted by its highest tribunal.[12] The suggestion that a construction of the act which took away the employee's or his dependents' right of action against a third person whose negligence was the cause of the injury or death, violated the equal protection clause of the Fourteenth Amendment was said to be "without merit."

[5] *Supra,* note 2.

[6] As a sidelight it is interesting to note that the constitutionality of the Washington Act, which is compulsory, was attacked. A very few words sufficed to dismiss the point. "Upon the argument much was said concerning the constitutionality of a legislative act compelling contribution from one person, or employer, to be used in paying for the negligence of another. This phase of the act is not now before the Court. That is a defense only to be made by those obliged to contribute to, or those charged with the duties of administering the funds contributed."

[7] Meese v. Northern Pac. Ry. Co., 211 Fed. 254 (1914).

[8] Cf. Smale v. Wright Washer Mfg. Co., 160 Wis. 331 (1915).

[9] *Supra,* note 3.

[10] Northern Pac. Rwy. Co. v. Meese (1916), U. S. Adv. Ops. 1915, p. 223.

[11] *Supra,* note 3.

[12] Old Colony Trust Co. v. Omaha, 230 U. S. 100 (1912); Fairfield v. Gallatin County, 100 U. S. (1879).

It is to be noted that while the District Court, in upholding the act, distinctly said that in this case the action was for the recovery of damages for the death of the employee, and that this right of action could be taken away, being merely statutory, the Supreme Court has made no distinction between action by the employee for injuries and actions by his dependents for his death. The former right of action existed at common law; the second right is purely statutory. The further fact that the opinion of the Supreme Court is based upon *Peet* v. *Mills,* in which the employee was suing for injuries received, justifies the conclusion that the decision in this case lays down the principle that the state legislature may abolish a right of action which existed at common law, just as it may abolish the common law defences.[13]

A large number of compensation statutes have specific provisions covering cases where the injury creates a legal liability in a third person. The English act[14] provides that, under such circumstances, the workman may take proceedings both against the third person to recover damages and against any person liable to pay compensation under the act for such compensation, but shall not be entitled to recover both damages and compensation.[15]

The Pennsylvania act[16] provides that "where a third person is liable to the employee or the dependents for the injury or death, the employer shall be subrogated to the right of the employee or th dependents against such third person, but only to the extent of the compensation payable under this article by the employer. Any recovery against such third person in excess of the compensation theretofore paid by the employer shall be paid forthwith to the employee or to the dependents, and shall be treated as an advance payment by the employer on account of any future installments of compensation."

The questions presented by the Pennsylvania act are whether the employer who has paid compensation can compel the employee to sue on his right of action against the third person or whether the employer can sue the third person in his own name, if the employee refuses to sue, and also what rights of intervention the employer has, if the employee himself does sue.

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[13] Second Employers' Liability Cases, 233 U. S. 1 (1911).

[14] 6 Edw. VII, Chap. 58, Sec. 6 (1906).

[15] See also Act June 28, 1913, Sec. 29, Ill. Laws 1913, p. 335; Mass. Act 1911, p. 998, Chap. 751, Part III, Sec. 15, as amended by Mass. Acts 1913, p. 371, Chap. 448; Wis. Rev. St. 1911, Chap. 110a, Sec. 2394-25, p. 1541. The Wisconsin Act provides that the making of a lawful claim against an employer for compensation under the act for the injury or death of his employee shall operate as an assignment of any cause of action in tort which the employee or his personal representative may have against any other party for such injury or death and the employer may enforce this liability in his own name.

[16] Act June 2, 1915, P. L. 736, Art. III, Sec. 319.